(4)

No. 01-123

Supreme Court, U.S.
FILED
OCT 2 2001
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

JSG TRADING CORPORATION,

*Petitioner,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF OF PETITIONER

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

October 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15pp

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| REPLY BRIEF OF PETITIONER | 1 |
| CONCLUSION | 10 |

# TABLE OF AUTHORITIES

CASES — Page

*Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... 4
*Christensen* v. *Harris County*, 529 U.S. 576 (2000) ..... 7
*FEC* v. *Akins*, 524 U.S. 11 (1998) ..... 10
*JSG Trading Corp.* v. *USDA*, 176 F.3d 536 (D.C. Cir. 1999) ..... 5
*Rothenberg* v. *H. Rothstein & Sons*, 183 F.2d 524 (3d Cir. 1950) ..... 5
*Sid Goodman & Co.* v. *United States*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991) ..... 5
*United States* v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) ..... 3

STATUTES AND REGULATIONS

7 U.S.C. § 499a(b)(13) ..... 6, 7
§ 499b(4) ..... 1, 2, 3, 6
§ 499h ..... 9
7 C.F.R. § 46.27 ..... 7
§ 46.2(hh) ..... 2, 6, 9
Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083 (Mar. 31, 1997) ..... 6, 8

ADMINISTRATIVE DECISIONS

*Produce Distribs., Inc.*, 58 Agric. Dec. 506 (1999), *aff'd*, 199 F.3d 1323 (2d Cir. 1999), *cert. denied*, 531 U.S. 928 (2000) ..... 5
*Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd*, 945 F.2d 398 (4th Cir. 1991) ..... 4
*Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd*, 953 F.2d 639 (4th Cir. 1992) ..... 5

## TABLE OF AUTHORITIES

OTHER AUTHORITY — Page

Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* (Jan. 2001) ..... 7

## REPLY BRIEF OF PETITIONER

In this case, the court of appeals upheld the ruling of the United States Department of Agriculture ("USDA") that the Perishable Agricultural Commodities Act ("PACA") prohibits *any* nontrivial payment to a buyer to induce the purchase of produce if the buyer's employer or principal is not "fully aware" of the payment. This strict rule applies even if the payment is unconnected to any specific transaction, is simply intended to cultivate a business relationship, and is made in good faith. Respondent does not even attempt to defend the agency's putative "commercial bribery" standard as consistent with PACA's express requirement that any alleged violation must be "in connection with [a] transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce." See 7 U.S.C. § 499b(4). Rather, respondent asks this Court to uphold the agency's interpretation of PACA so long as it is consistent with past agency precedent. Not only is its approach to statutory construction untenable, but the agency's new rule flatly conflicts with its commercial bribery precedent, which was expressly based on PACA's transactional nexus requirement and prohibited secretive payments in the form of a *quid pro quo* that would subvert the agent's fiduciary duty of loyalty to the principal in that transaction.

More fundamentally, Congress amended PACA in 1995 to clarify the scope of commercial bribery under the statute by declaring *all* "good faith" collateral payments in connection with a perishable agricultural commodities transaction to be lawful. Respondent never explains how, in the wake of the 1995 amendments, a collateral payment may violate PACA without a determination of whether that payment was in "good faith." See Pet. App. 77a. It also never explains how the agency can create by adjudication a blanket rule that all nontrivial gifts or payments to an agent must be fully disclosed to the principal when its own regulations only

require disclosure when the payments "affect a material term of the agreement," see 7 C.F.R. § 46.2(hh).

The agency's infidelity to the statute, its regulations, and its precedents in its zeal to revoke petitioner's license is breathtaking. The injustice and arbitrariness of the agency's actions alone warrant certiorari, but more critical is the devastating uncertainty and disruption within the perishable agricultural commodities industry created by the agency's elimination of the distinction between commercial bribes and legitimate promotional activities that are necessary and commonplace within this industry. A major trade group, Food Distributors International ("FDI"), which has no stake in the outcome of this case, see Brief of Food Distributors International as *Amicus Curiae* 3-4 (hereinafter "*Amicus* Br."), has represented to this Court that the agency's new rule destroys settled expectations in the industry, and gives the licensee a Hobson's choice to either abandon routine business practices that are necessary to hedge risk and ensure the efficient movement of produce to market, or face license revocation actions if it does not comply with a new and unsupportable standard. *Id.* at 8-9. Licensees thus cannot safely engage in necessary business activities that Congress expressly protected. FDI's description of industry practices and the urgency of its concerns belie respondent's cavalier and inaccurate claim that the agency's standard makes no change in the regulatory regime. This Court should not ignore the disorder in a significant industry that contributes over $100 billion to the economy; it should grant certiorari to restore the regulatory scheme crafted by Congress.

1. Section 2(4) of PACA prohibits unfair trade practices, including the failure "to perform any specification or duty, express or implied," but only if the duty "aris[es] out of any undertaking" that is "in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce." 7 U.S.C. § 499b(4). The agency ignored PACA's transactional-nexus

requirement in defining its broad new standard of commercial bribery, which declares unlawful any gift or payment intended to induce the sale or purchase of produce of which the employer is not fully aware, regardless of any link to a specific transaction. Pet. App. 28a. Upholding this standard, the court of appeals held that even ordinary social hospitality (such as taking an agent to dinner) that licensees routinely extend to cultivate business goodwill and induce the purchase of its products would be commercial bribery if not fully disclosed to the principal. *Id.* at 10a-11a.

This Court held in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), that a statutory prohibition of gifts or payments for "an 'official act'" in the federal gratuity statute meant that gratuities to generate goodwill were not covered by the statute. *Id.* at 406. Respondent's rejoinder that *Sun-Diamond* involved a different statute misses the mark. See Opp. 11. The point is that an agency or court cannot dispense with statutory limitations to create a general antigratuity offense. The textual reference to "any transaction" in section 2(4) of PACA cannot meaningfully be distinguished from the requirement that a gift be linked to "any official act" in the federal gratuity statute. See *id.* The parallel language in the two statutes suggests a parallel reading: just as the gratuity statute's "insistence upon an 'official act'" requires "that some particular official act be identified and proved," see 526 U.S. at 406, so too does PACA's insistence upon a "transaction involving any perishable agricultural commodity," see 7 U.S.C. § 499b(4), require proof that the payment is connected to such a transaction. Any other reading of PACA would extend its reach to "'any effort to buy favor or generalized goodwill,'" an interpretation rejected by this Court in *Sun-Diamond*, and one that should be rejected here. See 526 U.S. at 405-06; see also *Amicus* Br. 19.

Conceding that the agency's new commercial bribery standard does not require a transactional nexus, respondent

nonetheless leaps to the conclusion that the agency is free to dispense with such a nexus because "[c]onstruction of the relevant PACA provision . . . is primarily entrusted to the USDA rather than the courts." Opp. 11. That is wrong. Courts determine and enforce the plain meaning of statutes; what is entrusted to the agency is the resolution of statutory ambiguity. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). PACA could not be plainer that the only duties covered are those "arising out of any undertaking in connection with" a perishable agricultural commodities transaction; the USDA lacks the power to fashion implied duties unrelated to specific transactions. Moreover, contrary to its current position, the agency has always considered a transaction nexus to be jurisdictional under PACA. See *Amicus* Br. 12-13. The court of appeals' failure to measure the USDA's standard against the statute was an abdication of judicial responsibility, and is the principal reason for the industry upheaval it has caused.

2. Even if judicial review were limited to ensuring consistency with agency precedent, Opp. 11, the agency's new commercial bribery standard could not stand. Agency precedent was firmly rooted in PACA's transactional-nexus requirement, and thus outlawed as commercial bribery only payments corruptly intended as a *quid pro quo* to induce the agent to favor the offeror in a specific transaction. In *Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), a vendor paid supermarket produce buyers $38,000 and $41,000, respectively, in undisclosed kickbacks of $.25 per box, which were recaptured by marking up the invoices by that amount. *Id.* at 1171, 1173-74, 1180. In finding a violation of PACA, the USDA relied on the statute and its regulations to determine that a PACA licensee must perform express or implied duties "in connection with any transaction handled subject to the Act," *id.* at 1182 (internal quotations omitted), including "avoiding that which is occasionally called 'payola,'" *id.* The Fourth Circuit upheld the *Goodman* rule

because the implied duty clause of section 2(4) applied to "any" duty arising from any undertaking in connection with any transaction, and that language was broad enough to prohibit "kickbacks." *Sid Goodman & Co.* v. *United States*, 945 F.2d 398, 1991 WL 193489, at **3-**4 (4th Cir. 1991) (per curiam) (table); *accord*, *Tipco, Inc.*, 50 Agric. Dec. 871, 882-85 (1991) (same), *aff'd*, 953 F.2d 639 (4th Cir. 1992) (per curiam) (table).

*Goodman* and *Tipco* thus prohibited secretive payments with the corrupt intent to induce the agent to conduct a produce transaction with them: a *quid pro quo*. This was recognized by a different panel of the District of Columbia Circuit in *JSG I*, which cited authority that commercial bribes require a *quid pro quo*, and likened the "intent to induce" requirement of *Goodman* and *Tipco* to the "'intent to influence'" element of the federal bribery laws, which this Court has long interpreted to require a *quid pro quo*. See *JSG Trading Corp.* v. *USDA*, 176 F.3d 536, 545 (D.C. Cir. 1999) (quoting *Sun-Diamond*, 526 U.S. at 404-05). The agency's new standard is not remotely justifiable as consistent with agency precedent, much less with the statute.[1]

3. If there were any doubt about the scope of *Goodman* and *Tipco*, Congress passed the 1995 PACA Amendments to make clear that "good faith collateral fees and expenses,"

---

[1] The petition also demonstrates that the USDA ignored agency and judicial precedent that state law determines the nature and scope of PACA duties not defined by statute or regulation. Pet. 26-27. Respondent claims that these precedents are limited to matters of state contract law, Opp. 12 n.3, but there is no basis or rationale for that limitation in the cases. *See Rothenberg* v. *H. Rothstein & Sons*, 183 F.2d 524, 526 (3d Cir. 1950) ("Congress did not intend . . . to exclude from this field the operation of such rules of state law as can be applied consistently with the express mandates of the federal act"); *see also Produce Distribs., Inc.*, 58 Agric. Dec. 506, 529 n.5 (1999) (applying New York law to determine the meaning of the term "joint venture" for purposes of section 2(4) liability), *aff'd*, 199 F.3d 1323 (2d Cir. 1999), *cert. denied*, 531 U.S. 928 (2000).

including promotional and marketing fees and expenses, rebates, discounts, and allowances, are fully protected. Reflecting the need efficiently to move highly perishable produce and mitigate the risk caused by these highly perishable commodities, the exemption for collateral fees and expenses was intended to "codif[y] USDA's longstanding position on the lawfulness of such fees under the PACA." Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). The only qualifications placed on collateral fees and expenses are that they be made in connection with marketing or distributing produce, and in good faith, see 7 U.S.C. §§ 499a(b)(13), 499b(4), and the regulations, adopted at the request of FDI, specify that the term "good faith" requires disclosure of collateral fees and expenses only when they "affect a material term of the agreement," 7 C.F.R. § 46.2(hh).

Even though the 1995 Amendments were passed for the specific purpose of clarifying that good faith promotional fees were not within the ambit of *Goodman* and *Tipco*, *Amicus* Br. 3-4, the USDA has now declared that it will find commercial bribery violations of PACA without regard to whether the payment is within the statutory safe harbor. Pet. App. 77a. The court of appeals erroneously condoned this approach, reasoning that a payment is not in good faith unless fully disclosed to the principal, and paying no heed to the agency's more limited (and unambiguous) "good faith" disclosure regulation. *Id.* at 11a. Thus, under the agency standard approved by the court of appeals, *all* nontrivial promotional and marketing fees and expenses paid to the agent of which the agent's employer or principal was not "fully aware" are commercial bribes.

Respondent makes no effort to defend this unprecedented "full awareness" requirement as consistent with the PACA Amendments or with its "good faith" disclosure regulation

that implements those Amendments.[2] Instead, respondent dismisses this point, countering that the "more salient point . . . is that promotional allowances and rebates are typically given to the customer (though they may be accepted on the customer's behalf by its agent) rather than being directed to the agent for his personal use." Opp. 10. Respondent cites no authority for this proposition, because there is none. To the contrary, the statutory protection for good faith collateral fees and expenses is unqualified. The term "collateral fees and expenses" means "*any* promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. § 499a(b)(13) (emphasis added). The statute makes *no* distinctions among recipients of such payments. This broadly-worded provision applies to good faith payments to any person involved in a covered transaction, whether the person is a farmer, shipper, repacker, retailer, wholesaler, broker, or an agent of *any* of these individuals.

Likewise, respondent's claim, again made without any legal authority whatsoever, that the "typical" method of inducing sales "is to offer incentives that make the transaction more favorable or attractive *to the customer*" is misleading and flatly inconsistent with the way this industry operates. See Opp. 10. Agents and brokers frequently purchase for, or sell to, numerous customers, often making it impossible for the seller even to know the identities of the actual customers. See 7 C.F.R. § 46.27; see also Economic Research Serv., U.S.

---

[2] The clarity of the regulation as to when disclosure of collateral fees is required is further refutation of the agency's claim that its "full awareness" standard for commercial bribery under section 2(4) is entitled to deference. *See Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("The regulation in this case, however, is not ambiguous . . . . To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* 9 (Jan. 2001) (defining brokers as "agents that negotiate transactions between buyers and sellers," including transactions in which "shippers were unaware of the final destination of the product").[3] As noted by *amicus*, "buyers and sellers at points of distribution are frequently undisclosed, at least to each other, *see* 7 C.F.R. §§ 46.27(a)-(b), leaving purchasing agents and brokers with the primary role of mitigating the risks associated with sales or consignments of perishable produce." *Amicus* Br. 2.

Moreover, many promotional and marketing activities commonplace in the industry, such as a dinner or tickets to a sporting event, by definition, do not inure to the benefit of the customer – it is the agent who enjoys these perquisites as a method to induce him to transact business with that particular seller. Thus, as is clear from the regulations and industry practice, the types of collateral fees and expenses protected by PACA extend well beyond direct incentives to customers – they encompass all forms of good faith off-invoice arrangements in connection with the distribution or marketing of produce. Respondent's naked claim that promotional payments to middlemen and agents for their own benefit are atypical simply ignores the industry. Not surprisingly, the industry is up in arms over this standard precisely because such payments are commonplace, necessary, and protected by PACA, and because the agency has issued a ruling that transforms standard practice into potential bases for ruinous license revocations. See *Amicus* Br. 8-9.

4. Respondent claims that this case is an unsuitable vehicle for addressing the issues raised in the petition because,

---

[3] Although the term "purchasing agent" does not appear in PACA or its regulations, the USDA considers a "purchaser's agent" to be a broker. Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084-85 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46).

despite its holding that no *quid pro quo* was required and that good faith was not a defense to a commercial bribery charge, the agency stated in the alternative that certain of the challenged payments were intended as a *quid pro quo* and were not in good faith. Pet. App. 9a n.7. Thus, respondent claims the agency would reach the same result under the correct legal standard. Opp. 12-13. That argument is meritless. First, the agency's alternative holding that certain payments by petitioner were not in good faith was based on an error of law that was contrary to its own regulation (namely, that lack of full disclosure proves lack of good faith, see Pet. App. 78a); petitioner is entitled to an adjudication under the correct legal standard.[4] Second, the license revocation was necessarily based on a finding of flagrant and repeated violations. See 7 U.S.C. § 499h. Although petitioner vigorously disputes whether any PACA violation could be found under a proper standard, the elimination of *any* violation would require readjudication of petitioner's license revocation. The government does not even controvert, for example, that certain payments that formed the basis of the revocation decision lacked a nexus to any PACA transaction. See, e.g., Pet. App. 46a-47a ($5,600 payment to Gloria Gentile violates PACA even though unconnected to any transaction). The proper course is for the USDA to conduct a new adjudication of whether any payments violate PACA under a correct legal standard, and then redetermine

---

[4] This means, for example, that the agency would have to make a finding that the challenged payments "affect[ed] a material term of the agreement." *See* 7 C.F.R. § 46.2(hh). In any event, the record demonstrates that if the correct legal standards were applied, no finding of commercial bribery could have been made. For example, there was substantial testimony that the principals knew about the challenged payments to the agents. *E.g.* Tr. 2823 (A. Gentile Test.); Tr. 488-89 (P. Prisco Test.); Tr. 1252-56 (A. Lomoriello Test.); Tr. 2896-97 (L. Beni Test.); JSG Ex. 51 (L. Beni Aff.). This level of knowledge on the part of the principals satisfies agency precedent and is consistent with the requirements of PACA.

whether any violations it might find justify license revocation. This Court does not engage in speculation as to whether the agency will reach the same result once its errors of law are corrected. See *FEC* v. *Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency . . . might later . . . reach the same result for a different reason.").

Contrary to respondent's claims, this case is an ideal vehicle for determining the legal issues raised in the petition; there are no factual or procedural obstacles that would prevent this Court from squarely resolving these issues. Moreover, the critical point is the grave uncertainty the USDA's standard has created in a significant sector of the economy through its blatant disregard of the statute, regulations, and agency precedent. Resolution of this question should not await the emergence of a circuit split. The repercussions of the USDA's unprecedented standard, if not addressed by this Court, will be felt immediately by *all* PACA licensees and other members of the industry who (with the sanction of Congress) depend on collateral fees and expenses to move produce, build relationships, hedge risk, and avoid losses. A decision from this Court clarifying the parameters of section 2(4) is necessary to eliminate the industry disruption created by the USDA and the decision below.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

October 2, 2001